IN THE

Supreme Court of the United States

OCTOBER TERM, 1956

No. 466

SECURITIES AND EXCHANGE COMMISSION,
Petitioner,

versus

LOUISIANA PUBLIC SERVICE COMMISSION,
MIDDLE SOUTH UTILITIES, INC.,
AND LOUISIANA POWER & LIGHT COMPANY,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit.

BRIEF OF LOUISIANA POWER & LIGHT COMPANY, RESPONDENT.

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OPINIONS BELOW

The opinion of the Court of Appeals (R. 134) is officially reported at 235 F. (2d) 167. The Securities and Exchange Commission findings and opinions are unreported; those of September 13, 1955 are found at R. 129, and of March 20, 1953 at R. 103.

JURISDICTION

Jurisdiction of this court is invoked under 28 U.S.C. 1254(1); writ of certiorari having been granted on

December 3, 1956 (R. 144) to the U. S. Court of Appeals (5th Circuit) decision of June 30, 1956 (R. 134).

QUESTIONS PRESENTED

I.

SUBSTANTIVE QUESTIONS

Whether the requirement of Section 11(b)(1)(A) of the Public Utility Holding Company Act of 1935 (the Act) that the retention of an additional integrated public utility system **shall** be permitted if

> "each of such additional systems cannot be operated as an independent system without the loss of substantial economies which can be secured by the retention of control by such holding company of such system"

means that

(a) the only "loss of economies" to be considered are those affecting the system to be disposed of, without regard to the economic effect on the remaining system; and

(b) the words "loss of substantial economies" must be construed to mean that losses to the system to be disposed of are so fatal that such system is "incapable of independent economic operation."

II.

PROCEDURAL QUESTIONS

Whether the special provision of Section 11(b)(1) (applicable to no other sections or subsections of the Act), namely,

> "The Commission may by order revoke or modify any order previously made under this sub-

> section, if, after notice and opportunity for hearing, it finds that the conditions upon which the order was predicated do not exist. Any order made under this subsection shall be subject to judicial review as provided in Section 24"

(a) grants no greater right of review and appeal than Section 24(a) of the Act, which applies to the Act as a whole; and (b) whether the phrase in the section above quoted, "the conditions upon which the order was predicated do not exist", should be interpolated to read "the conditions upon which the order was predicated do not, *and did not at the time of the previously issued order* exist, *and that no review of erroneous legal conclusions which might be, or might have been, essential conditions of such order can be entertained.*

The Securities and Exchange Commission (SEC) contends that both substantive questions I(a) and I(b) are to be answered in the affirmative. Respondent believes both should be answered in the negative. However, if either of the substantive questions are to be answered in the negative, the judgment of the Court below should be affirmed and the matter remanded to the SEC for further proceeding. Respondent Louisiana Power & Light Company (Louisiana) suggests that the substantive questions are of such great importance that they should be passed on by this Court. Louisiana believes both procedural questions should be answered in the negative. However, it will in this brief comment only briefly on the procedural questions.

STATUTE INVOLVED

The Public Utility Holding Company Act of 1935, and Sections 1, 8, 11(b), and 24(a) thereof (15 U.S.C.

79a, 79(k)(b), 79(h) and 79x(a)). Sections 1 and 8 are set forth in the appendix hereto.

STATEMENT

In the hearing before the SEC of February 1953, and again in the hearing of July 1955, Louisiana continuously and consistently took the position that (a) its gas system cannot be operated as an independent system without the loss of substantial economies which can be secured by retention of such system by Louisiana, (b) that the interest of gas and electric customers of Louisiana, as well as the public interest, would best be served by the continued operation of both systems by Louisiana, and (c) that the continued operation of both the gas and electric systems under the control of Louisiana (a subsidiary of Middle South Utilities, Inc.) does not result in an operation so large (considering the state of the art and the area or region affected) as to impair the advantages of localized management, efficient operation, or effectiveness of regulation, and further, that Louisiana's gas distribution system in and around the City of New Orleans is integrated with the gas distribution system of New Orleans Public Service, Inc., a sister company serving the City of New Orleans, and should be retained for this additional reason.

On January 29, 1953, the SEC issued a notice of the convening of a hearing to be held on February 19, 1953, pursuant to Section 11(b)(1) of the Act, to decide, among other things, whether Louisiana should be required to take action to dispose of the gas utility assets and non-electric assets of Louisiana (R. 80). In accordance with this notice, a hearing was held on February 19 and 20, 1953, approximately three weeks after the date of the notice. At this hearing, Louisiana introduced

evidence in support of its position above stated, in the form of Exhibits and oral testimony of its President. This evidence showed that, based upon its operations in the year 1952, as a result of the proposed separation of the gas properties from its system, Louisiana's remaining electric properties would have had, during 1952, a loss of economies amounting to approximately $400,000-$430,000 (R. 117). This was based on a personnel study. Mr. Turner also testified that he estimated that there would be a loss of economies in the gas properties on the order of $250,000, based on his experience in operating these properties of Louisiana from its organization in 1927. This estimate as to the loss of economies in the gas properties was not based on a separation study, as Louisiana had not been able to make such a study between the date of the notice, January 29, 1953, and the date of hearing, February 19, 1953, and inasmuch as the Louisiana Public Service Commission (the Louisiana Commission) later took approximately four months to make such a study, it would appear doubtful that such a study could have been made within that period. In its findings and opinion of March 20, 1953, in which the SEC held that Louisiana should dispose of its gas properties, it specifically commented:

> "No study of any kind was introduced to show what the expense of the gas properties would be if they were to be operated as a separate unit."

The evidence introduced by Louisiana as to the loss of economies to the electric and gas properties was uncontradicted in the record at the hearing on February 19 and 20, 1953 and the staff of the SEC introduced no contrary evidence, nor any evidence of compensating advantages to be gained by the separation of the gas properties.

On March 20, 1953, SEC issued its divestment order (R. 127).

After Louisiana, on November 10, 1954, filed with SEC a joint Application-Declaration with Louisiana Gas Service Corporation, proposing a plan for disposition of its non-electric properties pursuant to such order, and filed the said plan with the Louisiana Commission, the Louisiana Commission, by telegram and petition, asked the SEC for a hearing, and asked that the proceedings on which the March 20, 1953 order was predicated be reopened. The SEC then requested the Louisiana Commission to file an Offer of Proof, and set a date for oral argument. Thereupon, the Louisiana Commission sent members of its staff to Louisiana's offices and proceeded over a period of four months to make a comprehensive separation study, which was subsequently filed with the SEC in its Offer of Proof. Exhibit B of this Offer of Proof (R. 17), with its supporting exhibits, indicates that, based on operations for the year 1954, separate operation of the gas properties would have resulted in an annual loss to non-electric consumers of $272,816, and an annual loss to electric customers of $684,377, or a total annual loss to Louisiana's customers of $957,193.

Lengthy oral argument was held in July 1955 resulting in the SEC order of September 13, 1955 (R. 129).

Louisiana stated before the SEC in the July 1955 hearing, and reiterated the same in its brief and statement on oral argument before the U. S. Circuit Court of Appeals for the Fifth Circuit, and here again reiterates, that it has examined the Offer of Proof and Exhibits attached thereto (R. 1 through 49) and believes that the facts which the Louisiana Commission there

sought to prove are substantially correct in all respects. An examination of the separation study made by the Louisiana Commission has been conducted and it was found to corroborate the testimony offered by Louisiana in the earlier SEC proceedings and demonstrates that a separation of the gas and electric properties cannot be effected without the loss of these substantial economies.

The Louisiana Commission appealed from the order of the SEC dated September 13, 1955, to the United States Circuit Court of Appeals for the Fifth Circuit which, after hearing oral argument, on June 30, 1956 handed down its opinion (R. 134) remanding the matter to the SEC for further consideration in the light of the opinion.

It is a geographical fact that the electric properties and the gas properties of Louisiana are both wholly within the State of Louisiana, and, in fact, the gas properties, with minor exceptions, serve the same territory as a portion of the electric system, and, in most instances, its gas customers are also its electric customers. All of Louisiana's rates, both gas and electric, are subject to regulation by the Louisiana Commission, except its rates for sale of electric energy to other utilities in interstate commerce, which are regulated by the Federal Power Commission, and except for its electric rates in Algiers, which is the 15th Ward of the City of New Orleans, which rates are regulated by the Commission Council of the City of New Orleans. None of its rates are regulated by the SEC. It is plain that the requirements of Section 11(b)(1)(B) are met, and no serious contention has been made that the conditions of Section 11(b)(1)(C) have not been met.

Serving electric customers in territory in Louisiana

adjacent to Louisiana's territory are utilities which also distribute gas to their customers.

When the Public Utilitiy Holding Company Act was passed in 1935, Louisiana was part of the Electric Bond and Share holding company system. That system consisted of Electric Bond and Share Company as the top holding company, having as its principal immediate subsidiaries five subholding companies, each of which in turn owned large numbers of utility operating companies operating in many widely scattered States. In total, there were more than 237 companies in this system, operating in 32 States and thirteen foreign countries.[1] The utility and non-utility fields in which these companies operated included electric generation, transmission and distribution, gas production, transportation and distribution, water production and distribution, telephone operation, public transportation, production and distribution of steam, production and sale of oil, sulphur, and other minerals, and a number of other businesses. Louisiana was a wholly owned subsidiary of Electric Power & Light Corporation, one of the five subholding companies of Electric Bond and Share. At that time, Louisiana was operating electric, gas, telephone, transportation, and water properties. Electric Power & Light owned 9 additional companies, operating in 11 additional States and in Mexico. At the time of the passage of the Holding Company Act, there were many other similar holding company systems operating in the utility field, and it was in light of this then existing situation that the Holding Company Act was considered and passed by Congress.

Since that time, Electric Bond and Share Co. has dis-

[1] See *Electric Bond & Share Company v. Securities and Exchange Commission*, 303 U.S. 419; *American Power & Light Company v. Securities and Exchange Commission*, 329 U.S. 90.

posed of control of all of its utility interests, except American and Foreign Power, which operates only outside of the United States, and Electric Bond and Share Co. no longer has any interest in Louisiana or in Middle South Utilities, Inc. Electric Power & Light Corporation, Louisiana's former parent, has been dissolved and its properties disposed of. Louisiana Power & Light Company, Arkansas Power & Light Company, Mississippi Power & Light Company and New Orleans Public Service Inc., four integrated utilities serving contiguous territory, have, with the approval of the SEC, been acquired by Middle South Utilities, Inc. (R. 103-128) Louisiana has disposed of its telephone properties, its transportation properties, its water properties, with the exception of a small property at Arcadia, Louisiana, and those electric properties which were physically separated from its integrated system. So that, today, Louisiana's operations are limited to its integrated electric system and its gas distribution properties, and one small water property. Its accounts have been duly "reclassified", its corporate structure simplified and it has met all other standards of the Act.

ARGUMENT

Counsel for Louisiana have reviewed the brief of the Louisiana Commission, and agree with and adopt the arguments therein made. In the interest of brevity and to save repetition, we will not here repeat these arguments although we believe that they are conclusive on the matter.

I.

SUBSTANTIVE QUESTIONS

SECTION 11(b)(1)(A) OF THE PUBLIC UTILITY HOLDING COMPANY ACT DOES NOT REQUIRE THE CONSTRUCTION (A) THAT THE ONLY

"LOSS OF ECONOMIES" TO BE CONSIDERED ARE THOSE AFFECTING THE SYSTEM TO BE DISPOSED OF, WITHOUT REGARD TO THE ECONOMIC EFFECT ON THE REMAINING SYSTEM, NOR (B) THAT THE WORDS "LOSS OF SUBSTANTIAL ECONOMIES" MUST BE CONSTRUED TO MEAN THAT LOSSES TO THE SYSTEM TO BE DISPOSED OF ARE SO FATAL THAT SUCH SYSTEM IS INCAPABLE OF INDEPENDENT ECONOMIC OPERATION

FOR THE FOLLOWING REASONS:

(A) THE ORDINARY MEANING OF THE WORDS OF THE STATUTE WOULD NOT LEAD TO SUCH CONSTRUCTIONS.

(B) SUCH CONSTRUCTIONS WOULD BE CONTRARY TO THE EXPRESSED INTENT OF CONGRESS AS SET OUT IN THE ACT.

(C) THE LEGISLATIVE HISTORY OF THE ACT DOES NOT COMPEL CONSTRUCTIONS AT VARIANCE WITH THE ORDINARY MEANING OF THE WORDS OF THE STATUTE.

(A)

The ordinary meaning of the words of the statute would not lead to such constructions

(1) The first substantive question is, what economies should be considered—only those lost by the system to be separated (as contended by SEC)—or all those involved in the transaction, as contended by the Louisiana Commission and Louisiana.

We suggest that if Congress intended that the only

economies with which it was concerned were those lost to the system to be separated, it would have put a period after the word "economies" and eliminated the remaining wording, so that Section 11(b)(1)(A) would read:

> "(A) Each of such additional systems cannot be operated as an independent system without the loss of substantial economies"

However, Congress added the words:

> "which can be secured by the retention of control by such holding company of such system."

It would appear Congress was concerned not so much with the **loss** of economies, as with the **economies** which could be **secured** by retention of control by the holding company system. Clearly, the **economies** which would be **secured** by retention would include economies in all of the retained properties. It is difficult to see how this plain language could be otherwise construed, particularly in view of Congress' expressed intent as discussed below. Here the facts offered for proof, which must be accepted as true for the purposes hereof, show that economies of $957,193 would be secured by the retention of the gas properties, which would otherwise be lost by separation of the gas properties. In order to reach its conclusion, contrary to the plain wording of the statute, the SEC must in effect add the words "to the independent system" to the language, so that the subsection would read as follows:

> "(A) Each of such additional systems cannot be operated as an independent system without the loss of substantial economies *to the independent system* which can be secured by the retention of control by such holding company of such system."

(2) The second substantive question is, whether loss of **substantial** economies, as used in the statute, would mean such a loss as would make an additional system incapable of independent operation. As shown above, the wording of the section indicates that the guiding standard is "substantial economies which can be secured by retention." The substantialness of the **economies,** not the substantialness of the **loss,** is what is in question. It follows that we are not concerned with the degree of disaster of the loss, but with the importance or substantialness of the economies which might be secured.

SEC argues that the phrase "substantial economies" cannot be clearly construed without reference to the legislative history of the Act to determine intent. While we will discuss legislative history later, it is submitted that the words "substantial economies" are no harder to construe than such oft construed phrases as "reasonable", "hazardous", "not so large considering the nature of the art", and innumerable others. While the meaning of the word "substantial" must be determined in accordance with the context in which it is used, generally speaking, it is understood to mean "important" as opposed to "inconsequential", "large" as opposed to "small".[2]

To engraft on the words of the statute the condition that loss of economies, to be substantial, must be so dis-

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[2] See Corpus Juris Secundum, Volume 83, page 762:

"The term has reference to something worthwhile as distinguished from something without value or merely nominal, and it imports a considerable amount of value in opposition to that which is inconsequential or small, and in this sense is defined as meaning of real worth and importance; of considerable value; valuable; considerable in amount, value, or the like. In opposition to that which is inconsequential or small, the term is also defined as meaning large."

The relative substantialness or importance of the economies here shown should be considered in the light of the action taken by the Louisiana Commission herein, since it is the Commission primarily concerned therewith.

astrous as to make the disposed of Company "incapable of independent economic operation"—words which Congress did not insert—as SEC seeks to do—is to import into the Act an entirely new and different standard of which the actual words of the statute give not the slightest intimation. Such a construction would be nothing less than an amendment of the Act.

It also seems clear that if Congress intended that "incapacity of the independent system to operate separately" was to be the standard to be applied, it could very easily have said just that. Congress did not say that. And the standard set up by the plain words of the statute should be applied — not that which an administrative agency decides the statute should have said.

(B)

Such construction would be contrary to the express intent of Congress as set out in the Act.

(i) The yardstick which Congress has clearly marked for guidance in the construction of the Public Utility Holding Company Act is the phrase "in the public interest or for the protection of investors or consumers". This phrase, or a paraphrase thereof, appears at least 70 times in the Act. It appears in Sections 1(b), 1(c), 2(3), 2(4), 2(7) (twice), 2(8) (twice), 3(a), 3(b), 3(d), 5(a), 5(b), 5(b)(1), 5(b)(2), 5(b)(3), 5(c), 6(b), 7(a), 7(a)(1), 7(a)(2), 7(c)(2), 7(c)(3), 7(d)(6), 7(e), 9(c)(2), 9(c)(3), 10(a), 10(a)(1), 10(a)(2), 10(a)(3), 10(b)(1), 10(b)(3), 10(b), 10(c)(2), 10(e), 11(b)(1), 11(c), 11(d), 11(e), 11(f) (twice), 11(g)(1), 11(g)(3), 12(b), 12(d), 12(e), 12(f), 12(i) (twice), 13(a), 13(b) (twice), 13(c), 13(d), 13(f), 14 (twice), 15(a), 15(b), 15(c), 15(d), 15(g), 15(h), 17(b), 17(c), 19, 20(b), 20(d), 22(a), 30.

The remarkable repetition of the phrases "public interest", "interest of investors" and "interest of consumers" clearly demonstrates that Congress intended these interests as a guide to interpreting the act.

Applying these measuring sticks to the facts in this case we find:

(a) As to **consumers** we find that the uncontroverted evidence in the record is to the effect that the interpretations urged by the S.E.C. are extremely detrimental to the consumers here involved, whereas the normal meanings of the words of the statute as urged by the Louisiana Commission would be greatly to the interest of the consumers involved. In this connection it is well to note that the S.E.C. has no direct contact with the consumers involved and no responsibility with respect to rates, whereas the Louisiana Commission is elected by such rate payers and has direct jurisdiction of such rates.

(b) As to the **public interest** the Governor of the State of Louisiana, the elected mayors and councilmen of 28 of the thirty towns scattered over Louisiana and the police jurors of fourteen of fifteen parishes in which Louisiana renders gas service have all, in addition to the elected public service commission, voiced their opinion that the public interest would be best served by retention of the gas properties by Louisiana (R. 45-49). The one parish (Jefferson) and the two municipalities located therein which at first favored severance on the basis of a proprietary interest in operating the gas properties within the parish as public operators have since withdrawn their opposition to the position of the Louisiana Commission.

On the contrary, there appears not one scintilla of evidence in the record that the public interest would be

in any way benefitted by the divestiture of the gas properties as urged by SEC. It would, therefore, appear that the public interest would be best served by the construction which we submit is in accordance with the usual meaning of the words of the Statute.

(c) As to the interest of investors the record is devoid of evidence as to how they might be affected one way or another. However, it is to be noted that prospective investors in first mortgage bonds of the gas properties as a separate system would require a higher interest rate than those investing in first mortgage bonds of the combined properties (R. 7-8) and it could be generally assumed that the position taken by Louisiana is in accord with the best interest of its stockholders.

(ii) Congress has expressly set out in Section 1 of the Act (See Appendix) the objectives which the Act sought to achieve and the evils which it sought to cure. In Section 1(b) are enumerated the conditions that do or may affect adversely the interest of the public, consumers or investors. A careful consideration of subsections 1(b) (1-5) in the light of the record in this case will clearly demonstrate that there exist here no enumerated evils which the ordered segregation of Louisiana's gas properties would cure, the elimination of which is the declared purpose of the Act.

For emphasis we quote from Section 1(c)

> "* * * it is hereby declared to be the policy of this title, in accordance with which policy all the provisions of this title shall be interpreted, to meet the problems and eliminate the evils as enumerated in this section, connected with public-utility holding companies which are engaged in interstate commerce or in activities which directly affect or burden interstate commerce; * * *"

It is clear that no enumerated evil would be eliminated by the SEC order, nor would such order provide for elimination of properties "detrimental to the proper functioning of such system".

(iii) It is generally accepted that an act should be interpreted as a whole, and all its sections construed so as to show a consistent purpose.

In that connection, attention is called to Section 8 of the act (See Appendix). This section in effect provides that the standard for decision as to whether a holding company or subsidiary thereof should be allowed to acquire gas properties serving the same territory as the electric property, is whether the state law prohibits it (which here it does not) and whether the State Commission expressly approves. It is submitted that this standard set up by the act for acquisition of gas properties is at sharp variance with the SEC's harsh interpretation of the conditions which must be met for retention of a gas property, particularly when the State Commission here is strongly urging retention.

(iv) Further, under Section 3 of the Act, the SEC has itself held that it is not necessary for an electric holding company to dispose of its gas properties before being granted exemption from the Act; although such company has been required to meet the other provisions of the act.[3]

(v) We further refer the court's attention to Section 21 of the Act and particularly the latter part reading as follows:

> "* * * nor shall anything in this title affect the jurisdiction of any other commission, board,

[3] *Re Northern States Power Company*, 6 P.U.R. (3d) 48 (September 16, 1954).

> **agency, or officer of the United States or of any State or political subdivision of any State, over any person,[4] security, or contract, insofar as such jurisdiction does not conflict with any provision of this title or any rule, regulation, or order thereunder."**

It is submitted that this is a matter in which the Louisiana Commission plainly has always had jurisdiction. In view of the above provision, this jurisdiction should not be disturbed unless it has been expressly superseded by a clear express provision of the Act, not by a strained expansive interpretation of the words of the Act.

(C)

The legislative history of the Act does not compel constructions at variance with the ordinary meaning of the words of the statute.

(1) As originally passed by the Senate, Section 11(b)(1) of Senate Bill 2796 made no exception to the death sentence provisions for retention of either additional integrated system for other businesses.[5] After considerable debate in the House, the section was amended and the amendments were explained in the report of the Committee of the whole House dated June 24, 1935, as follows:

> "Sub-section (b), relating to the simplification of holding company systems and elimination of holding companies, is modified so that the only remaining provision providing for simplification or elimination makes it the duty of the commission to require each holding company system to confine its operations to one integrated public utility system, with the exception that if the commission finds that such a limitation is not necessary in the public interest, it is to require the limitation of the

[4] Defined to include "corporations".
[5] See Senate Report 621, 74th Cong., 1st Sess., pp. 11, 32.

operations of the holding company system to such number of integrated public utility systems as it finds may be included in the holding company system consistently with the public interest. The commission is authorized to require divestment of non-utility property only where it finds the retention thereof would be inconsistent with the public interest, and the commission is further limited in that it may not require divestment of interests outside of the United States." (H. Rep. 1318, 74th Cong., 1st Sess., p. 17)

Thus, very broad exceptions to the death sentence provisions were added by the House. The House version was passed July 2, 1935 (74th Cong., 1st Sess., Cong. Rec. p. 10640). On July 9, 1935, the Senate disagreed with the House amendments and asked for a conference. On July 12, 1935, the House insisted on its amendments and agreed to a conference with the Senate. (74th Cong., 1st Sess., Cong. Rec., p. 11095).

On August 1, 1935, Mr. Rayburn made a motion in the House to instruct the House conferees to agree to the provisions of Section 11 as set out in the original Senate Bill. This motion was defeated in the House. On August 23, 1935, the conference report was submitted by Mr. Rayburn, in which it is stated:

"Under the House amendment (Section 11(b)) the commission is required to direct each holding company system to reduce its operations to one integrated public utility system (a defined term meaning substantially the same as geographically and economically integrated public utility systems, the term used in the Senate bill) with the exception, however, that if the commission finds that it is not necessary in the public interest to limit the operations of the system to one integrated public utility system, it is to require such action as is necessary to limit the operations of the

system to such number of integrated public utility systems as it finds may be included in the holding company system consistently with the public interest * * *

"The substitute agreed to, with respect to the question of integrated public utility systems provides that the commission shall as soon as practicable after January 1, 1938, require each holding company system to be limited to a single integrated public utility system and such other integrated public businesses as are incidental or economically appropriate to such integrated system, but includes an exception.

"This exception provides that the commission shall permit additional integrated systems if it finds that

(1) each such additional system cannot be operated as an independent system without the loss of substantial economies which can be secured by the retention of control of the holding company;

(2) all such additional systems are located in a restricted area;

(3) the continued combination of such systems under the control of one holding company is not so large as to impair the advantages of localized management, effieient operation or the effectiveness of regulation. * * *

It may be observed that Section 11(b) in both the Senate bill and the House amendment contemplates the reestablishment of the advantages of localized management in the operating utility industry and the consequent breakdown of the controlled companies over geographically scattered operating utility companies. Section 11 of both bills, therefore, authorizes the Securities and Exchange Commission to require a holding company to limit its control over operating utility companies to one integrated public utility system.

"To this limitation the Senate bill like the House bill allows in Section 3 exceptions in the case of a holding company whose interests are essentially intrastate and in the case of a holding company whose interests are essentially foreign. The House amendment grants what amounts to a further exception when the commission finds that more than one integrated system may be included in a holding company system 'consistently with the public interest.'

"The conference substitute meets the House desire to provide for further flexibility by the statement of additional definite and concrete circumstances under which exception should be made to the form of one integrated system. Definite exceptions not only provide a satisfactory constitutional standard but also an effective standard for the guidance of both the Securities and Exchange Commission and those holding companies which wish voluntarily to comply with congressional policy." (H. Rep. 1903, 74th Cong., 1st Sess., p. 69-70)

Section 11(b) of the Act was debated hotly and at great length. The Senate bill proposed by Senator Wheeler would allow no exception to the limitation of holding companies to one integrated public utility system. The House, however, insisted that exceptions be made for both additional integrated utility systems as well as other businesses. The House insisted on its amendment by votes on two occasions. The resulting compromise reported by the Conference Committee retained exceptions insisted on by the House for both additional integrated utility systems and other businesses, within more accurately defined limits. It seems clear that the bill, or at least Section 11(b), could not have passed Congress without these exceptions, which were necessary to get an agreement by the House. It would be natural for proponents of the original Senate bill to seek by argument or inter-

pretation in debate to narrow the scope of these exceptions. However, the interpretations given to the exceptions, contained in 11(b)(1)(A)(B)(C), by the SEC, would, for all practical purposes, eliminate the exception entirely. We submit that, based on the legislative history, the House would not have agreed to a provision expressly circumscribing this exception to the extent contended for by the SEC.

(2) Senate Bill 2796, as amended, which became the Public Utility Holding Company Act of 1935, was in part the result of recommendations contained in the report of the National Power Policy Committee on public utility holding companies. On page 59 of its report (Appendix to Senate report 621, p. 59) this Committee states in part:

> "Unless approval of a State Commission be obtained, the Commission should not permit the use of the holding company form to combine a gas and electric utility serving the same territory where local law prohibits the combination in a single company."

This would certainly indicate that it was the Committee's recommendation that such combination of gas and electric properties would not be prohibited either (a) where local law permits such combinations, or (b) the approval of the State Commission has been obtained.[6]

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[6] See, also, Senate Report 621, 74th Cong., 1st Session, page 29-30, where, in discussing the provisions of Section 8 of the Act, it is stated:

> "These provisions are so designed as not to interfere with State policy which allows or fosters the carrying on of waterworks, traction business, bus systems, etc., by electric and gas utilities so long as that policy will not deter the carrying out of the provisions of Section 11. * * * This subsection is concerned with competition in the field of distribution of gas and electric energy: a field which is essentially a question of State policy, but becomes the proper subject of Federal action where the extra-State device of a holding company is used to circumvent State policy."

Even statements by proponents of the Senate version indicate that the extent of the objective of the Act was to reduce the systems to such a size that they were susceptible of local regulation.[7]

It is submitted that in light of the above considerations, the legislative history of the Act does not compel a construction at variance with the ordinary meaning of the words of the Act, and it is submitted that the words of the Act are plain and do not support either construction sought to be placed on them by the SEC.

II.

PROCEDURAL QUESTIONS

(A) IN SPECIALLY PROVIDING IN SECTION 11(b) FOR REVIEW, REVOCATION OR MODIFICATION OF ORDERS UNDER SECTION 11(b) AND PROVIDING FOR APPEAL THEREFROM, CONGRESS WAS CLEARLY EXPRESSING ITS INTENTION THAT ORDERS UNDER SECTION 11(b) SHOULD BE REVIEWABLE AT ANY TIME WHERE THE CONDITIONS ON WHICH THEY WERE BASED DO NOT EXIST.

(B) THERE IS NO BASIS FOR JUSTIFYING THE INTERPOLATION OF WORDS IN THE

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[7] "Mr. Sisson: * * * But what we are hoping is that when we get the holding companies in a position where they can be properly regulated, as they can be by only Sections 11 and 13 of the Senate Bill in this legislation, that we may then look to the States for proper regulation of the operating companies." (74th Cong., 1st Sess., Cong. Rec. 10540)

"Mr. Wheeler: The section further provided that if they desired to continue to be holding companies, they might do so; that they could control other companies provided they controlled them in integrated sections where the people themselves could reach them and where there could be effective regulation." (74th Cong., 1st Sess., Cong. Rec. 10839)

PHRASE "CONDITIONS DO NOT EXIST" SO AS TO IMPORT A REQUIREMENT OF "CHANGED CONDITIONS".

With respect to these procedural issues, we submit likewise that the wording of the statute is plain, that interpretation of the language of the statute in accordance with the ordinary meaning of the words is not contrary to the intent of Congress as expressed in the Act, and that such interpretation is consistent with the legislative history of the Act. The plain language of the statute makes **any** order relative to revocation or modification (whether granting or denying such revocation or modification) expressly appealable.[8] Its reference to Section 24 is merely to govern the procedure on appeal. We adopt without repeating the arguments made on these questions by the Louisiana Commission and add simply the following comment:

The SEC argues for its interpretations on these points the need for a final and definitive settlement of issues. Equal weight should be given, in approaching interpretations of the law, to the interest in making the Act adjustable to the present day facts of the situation. The regulatory process with which the SEC is charged is a continuing one, just as is the rate-making process. The SEC's approach would be so restrictive that it would not permit itself to correct its own acknowledged errors. It is submitted that Section 11(b), known as the death sentence section, is the most drastic provision in the entire Public Utility Holding Company Act. This would

[8] "Mr. Borah: In other words, all these orders which would be made with reference to reorganization and so forth would be appealable to the Court."

"Mr. Wheeler: Absolutely." (74th Cong., 1st Sess., Cong. Rec. 8946.)

appear to be good reason for granting the additional review of orders issued by the commission under this section, as specifically set out in the section. The disposal of the gas properties by Louisiana has not yet taken place, so that no harm would be done by a revocation or modification of the order. We submit that the SEC should be able to commute the death sentence up to the time of execution.

In its brief, the SEC laid stress on the fact that the Act calls for compliance with Section 11(b) "as soon as practicable after January 1, 1938." We submit that this is a relative term. It was not until more than fifteen years after January 1, 1938, that the SEC entered the disposition order here involved. We are not suggesting that this length of time would not be as soon as practicable. It had to be preceded by many complex unravelings of investors' interests and corporate set-ups. We do say that in view of the time that has elapsed in reaching this point in the enforcement of the Holding Company Act, and in view of the very serious results in the carrying out of the order, that a further review of the order at this time would not be violative of the "as soon as practicable" mandate of the statute.

CONCLUSION

It is respectfully submitted that the decision of the Court below interprets the language of the Act in accordance with the plain and ordinary meaning of the words of such Act, that such interpretation is consistent with the intent of Congress as expressed in the Act, and that such interpretation is consistent with the legislative history of the Act. It is therefore respectfully submitted

that the decision of the Court below should be affirmed.

Respectfully submitted,

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APPENDIX

Section 1 of the Public Utility Holding Company Act of 1935 (15 U.S.C. 79(a), 49 Stat. 838):

"Section 1. (a) Public-utility holding companies and their subsidiary companies are affected with a national public interest in that, among other things, (1) their securities are widely marketed and distributed by means of the mails and instrumentalities of interstate commerce and are sold to a large number of investors in different States; (2) their service, sales, construction, and other contracts and arrangements are often made and performed by means of the mails and instrumentalities of interstate commerce; (3) their subsidiary public-utility companies often sell and transport gas and electric energy by the use of means and instrumentalities of interstate commerce; (4) their practices in respect of and control over subsidiary companies often materially affect the interstate commerce in which those companies engage; (5) their activities extending over many States are not susceptible of effective control by any State and make difficult, if not impossible, effective State regulation of public-utility companies.

(b) Upon the basis of facts disclosed by the reports of the Federal Trade Commission made pursuant to S. Res. 83 (Seventieth Congress, first session), the reports of the Committee on Interstate and Foreign Commerce, House of Representatives, made pursuant to H. Res. 59 (Seventy-second Congress, first session) and H. J. Res. 572 (Seventy-second Congress, second session) and otherwise disclosed and ascertained, it is hereby declared that the national public interest, the interest of investors in the securities of holding companies and their subsidiary companies and affiliates, and

the interest of consumers of electric energy and natural and manufactured gas, are or may be adversely affected—

(1) when such investors cannot obtain the information necessary to appraise the financial position or earning power of the issues, because of the absence of uniform standard accounts; when such securities are issued without the approval or consent of the States having jurisdiction over subsidiary public-utility companies; when such securities are issued upon the basis of fictitious or unsound asset values having no fair relation to the sums invested in or the earning capacity of the properties and upon the basis of paper profits from intercompany transactions, or in anticipation of excessive revenues from subsidiary public-utility companies; when such securities are issued by a subsidiary public-utility company under circumstances which subject such company to the burden of supporting an overcapitalized structure and tend to prevent voluntary rate reductions;

(2) when subsidiary public-utility companies are subjected to excessive charges for services, construction work, equipment, and materials, or enter into transactions in which evils result from an absence of arm's-length bargaining or from restraint of free and independent competition; when service management, construction, and other contracts involve the allocation of charges among subsidiary public-utility companies in different States so as to present problems of regulation which cannot be dealt with effectively by the States;

(3) when control of subsidiary public-utility companies affect the accounting practices and rate, dividend, and other policies of such companies so as to complicate and obstruct State regulation of such companies, or

when control of such companies is exerted through disproportionately small investment;

(4) when the growth and extension of holding companies bears no relation to economy of management and operation or the integration and coordination of related operating properties; or

(5) when in any other respect there is lack of economy of management and operation of public-utility companies or lack of efficiency and adequacy of service rendered by such companies, or lack of effective public regulation, or lack of economies in the raising of capital.

(c) When abuses of the character above enumerated become persistent and widespread the holding company becomes an agency which, unless regulated, is injurious to investors, consumers, and the general public; and it is hereby declared to be the policy of this title, in accordance with which policy all the provisions of this title shall be interpreted, to meet the problems and eliminate the evils as enumerated in this section, connected with public-utility holding companies which are engaged in interstate commerce or in activities which directly affect or burden interstate commerce; and for the purpose of effectuating such policy to compel the simplification of public-utility holding-company systems and the elimination therefrom of properties detrimental to the proper functioning of such systems, and to provide as soon as practicable for the elimination of public-utility holding companies except as otherwise expressly provided in this title."

Section 8 of the Public Utility Holding Company Act of 1935 (15 U.S.C. 79(h), 49 Stat. 817):

"Section 8. Whenever a State law prohibits, or requires approval or authorization of, the ownership or operation by a single company of the utility

assets of an electric utility company and a gas utility company serving substantially the same territory, it shall be unlawful for a registered holding company, or any subsidiary company thereof, by use of the mails or any means or instrumentality of interstate commerce, or otherwise,—

(1) to take any step, without the express approval of the State commission of such State, which results in its having a direct or indirect interest in an electric utility company and a gas utility company serving substantially the same territory; or

(2) if it already has any such interest, to acquire, without the express approval of the State commission, any direct or indirect interest in an electric utility company or gas utility company serving substantially the same territory as that served by such companies in which it already has an interest."